

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

**ALYSSA M. CLAYTON**

Claimant

v.

**UNIVERSITY OF KANSAS HOSPITAL AUTHORITY**

Respondent

and

**SAFETY FIRST INSURANCE COMPANY**

Insurance Carrier

Docket No. 1,061,351

**ORDER**

Respondent and its insurance carrier (respondent) request review of the November 25, 2015, Award entered by Administrative Law Judge (ALJ) William G. Belden. This is a post-award proceeding for medical benefits. The claim has been placed on the Board's summary docket for disposition without oral argument.

**APPEARANCES**

Claimant appears by counsel, James E. Martin of Overland Park, Kansas. Respondent appears by counsel, Matthew J. Stretz of Kansas City, Missouri.

**RECORD AND STIPULATIONS**

The Board has considered the post-award record and adopted the stipulations listed in the Award.

**ISSUES**

The ALJ found Dr. Shah's opinions of April 8, 2013, constitute competent medical evidence that rebuts the presumption that no further medical treatment is needed, and accordingly denied respondent's Application to Terminate Future Medical. The ALJ reserved ruling on claimant's counsel's request for post-award attorney fees until all litigation on the merits of respondent's application is completed.

Respondent argues claimant's right to future medical treatment, left open in the Award, should not continue when she has not requested medical treatment within the two year limitation of K.S.A. 2011 Supp. 44-510k(a)(3). Respondent contends the statute provides the presumption that future medical may be terminated if claimant fails to request

additional treatment during the two years following the date of settlement. Respondent argues claimant failed to present new medical evidence or testimony to rebut the presumption that medical treatment is no longer needed. Respondent also contends the ALJ has discretion to award attorney fees and costs; they are not considered a matter of right. Respondent argues the ALJ is rewarding claimant's counsel's inaction and failure to present new evidence and penalizing respondent by imposing attorney fees and costs. Respondent requests the Board terminate claimant's medical benefits and overturn the ALJ's Award.

Claimant contends the ALJ correctly dismissed respondent's theory that an absolute right exists to terminate future medical care because claimant had not requested medical care within two years from the date of the settlement. Claimant argues she is not required to present new evidence rebutting the presumption created by the statute. Claimant argues respondent offered no evidence to contradict the only medical information in evidence stating claimant will likely need future medical treatment. Claimant also contends the ALJ has not yet ruled on whether to award attorney fees and costs; therefore, this issue does not exist at this time. Claimant requests the Board affirm the ALJ's Award and deny respondent's application.

The issues on appeal are:

1. Should claimant's right to future medical treatment be terminated because claimant received no medical treatment from an authorized physician within two years following the date of the settlement by running Award?
2. Is claimant required to present new evidence to overcome the presumption that no further medical care is needed because claimant received no medical treatment from an authorized physician within two years following the date of the settlement by running Award?
3. Is an award of claimant's counsel's attorney fees and costs reasonable and appropriate?

#### **FINDINGS OF FACT**

Claimant suffered an injury by accident to her left knee arising out of and in the course of her employment on October 6, 2011. On May 30, 2013, claimant settled her claim for a lump sum payment of \$9,435 on a running award basis, based on a 8.5 percent permanent partial impairment of the left knee. Future medical treatment and review and modification were left open. Attached to the settlement hearing transcript was the April 8, 2013, medical report from Dr. Shah, which states:

I believe the patient will likely need future medical treatment that is directly related to this slip and fall injury given her high-grade articular chondral lesion over the

lateral femoral condyle. Future medical treatment may necessitate steroidal injection, viscosupplementation injection, and/or surgical intervention utilizing arthroscopy with debridement, chrondroplasty, microfracture procedure. (Settlement Hrg. Trans. Attachment at 2.)

On June 15, 2015, respondent filed an E-4 Application for Post Award Medical, Termination or Modification of Medical Benefits and a Motion for Permanent Termination of Future Medical Benefits Pursuant to K.S.A. 44-510k. A motion hearing was held on August 5, 2015. Without objection, the ALJ reviewed and considered the Motion, Affidavit and time itemization, and heard comments by counsel for the parties.

### **PRINCIPLES OF LAW AND ANALYSIS**

K.S.A. 2011 Supp. 44-510k(a) provides:

(1) At any time after the entry of an award for compensation wherein future medical benefits were awarded, the employee, employer or insurance carrier may make application for a hearing, in such form as the director may require for the furnishing, termination or modification of medical treatment. Such post-award hearing shall be held by the assigned administrative law judge, in any county designated by the administrative law judge, and the judge shall conduct the hearing as provided in K.S.A. 44-523, and amendments thereto.

(2) The administrative law judge can (A) make an award for further medical care if the administrative law judge finds that it is more probably true than not that the injury which was the subject of the underlying award is the prevailing factor in the need for further medical care and that the care requested is necessary to cure or relieve the effects of such injury, or (B) terminate or modify an award of current or future medical care if the administrative law judge finds that no further medical care is required, the injury which was the subject of the underlying award is not the prevailing factor in the need for further medical care, or that the care requested is not necessary to cure or relieve the effects of such injury.

(3) If the claimant has not received medical treatment, as defined in subsection (e) of K.S.A. 44-510h, and amendments thereto, from an authorized health care provider within two years from the date of the award or two years from the date the claimant last received medical treatment from an authorized health care provider, the employer shall be permitted to make application under this section for permanent termination of future medical benefits. In such case, there shall be a presumption that no further medical care is needed as a result of the underlying injury. The presumption may be overcome by competent medical evidence.

(4) No post-award benefits shall be ordered, modified or terminated without giving all parties to the award the opportunity to present evidence, including taking testimony on any disputed matters. A finding with regard to a disputed issue shall be subject to a full review by the board under subsection (b) of K.S.A. 44-551, and

amendments thereto. Any action of the board pursuant to post-award orders shall be subject to review under K.S.A. 44-556, and amendments thereto.

The only medical evidence in the record is the report of Dr. Shah, which was attached to the settlement hearing transcript. Dr. Shah opined claimant would likely need steroid injections and/or surgery at some point in the future. Dr. Shah's opinions are uncontroverted. Uncontroverted evidence may not be disregarded and is generally regarded as conclusive absent a showing it is improbable or untrustworthy.<sup>1</sup> The Board recognized claimant presented no new evidence at the post-award hearing. However, respondent presented no evidence contradicting the opinions of Dr. Shah. K.S.A. 2011 Supp. 44-510k(a)(3) does not contain language requiring a current medical opinion to rebut the presumption. The statute only requires competent medical evidence, which the Board finds in Dr. Shah's report.

Respondent asked the Board to determine if attorney fees and costs are reasonable. The ALJ did not make an award for post-award attorney fees in his November 25, 2015, Order. As such, this issue is moot. Requests for post-award attorney fees should be submitted to the ALJ in accordance with K.S.A. 2011 Supp. 44-536(g).<sup>2</sup>

### **CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board finds claimant has overcome the presumption that she no longer needs future medical treatment pursuant to K.S.A. 2011 Supp. 44-510k.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>3</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

### **DECISION**

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member that the Post-Award Medical Award of Administrative Law Judge William G. Belden dated November 25, 2015, is affirmed.

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<sup>1</sup> See *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

<sup>2</sup> See *Arbaugh v. Old Dominion Freight Line, Inc.*, No. 1,062,204, 2015 WL 5918872 (Kan. WCAB Sept. 22, 2015); *Clover v. YRC Incorporated*, No. 1,039,449, 2014 WL 1340585 (Kan. WCAB Mar. 10, 2014); *Webb v. Hi-Lo Industries*, No. 247,536, 2014 WL 2616679 (Kan. WCAB May 6, 2014).

<sup>3</sup> K.S.A. 2014 Supp. 44-555c(j).

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of March, 2016.

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BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

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BOARD MEMBER

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Hon. William G. Belden, Administrative Law Judge